Outsourcing

in 21 jurisdictions worldwide

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United States

William T Russell, James E Nelson, Nora E Garrote, Armand J (AJ) Zottola, Michelle Ontiveros Gross and Charles K Kolstad*

Venable LLP

Market overview

1 What kinds of outsourcing take place in your jurisdiction?

The most common forms of outsourcing in the United States are information technology outsourcing (ITO) (eg, computers, network connectivity, applications development and maintenance) and business process outsourcing (BPO) (eg, human resources, finance and accounting, facilities management, procurement). IT outsourcing has also expanded into information process outsourcing, which includes functions such as application development, content development, data conversion, data processing, database administration.

While not as prevalent as BPO and IT outsourcing, knowledge process outsourcing (KPO), where vendors offer very specialised training and knowledge to clients is becoming more common. KPO in industries such as pharmaceuticals and law include services such as managing pharmaceutical trials or drafting patent claims. In recent years, the outsourcing landscape has expanded to also include research process outsourcing (RPO) where professional vendor personnel provide research to a client such as legal research, market research and investment research.

2 Describe the recent history of outsourcing in your jurisdiction. How well established is outsourcing? What is the size of the outsourcing market in your jurisdiction?

There has been an uptick in IT outsourcing in recent years. Experts attribute some of the gain in the market to the outsourcing of IT solutions in the health-care market as a response to increased health-care costs. That said, 2013 may have been the first time in the last four years that IT outsourcing as a percentage of total IT budgets has declined. Computer economics suggests that the decline is due to companies such as General Motors bringing formerly outsourced IT services back into the company.

Policy

3 Has the government of your jurisdiction adopted policies to encourage the development of the jurisdiction as an outsourcing centre, either for the domestic market or to provide outsourcing services to foreign customers?

The United States has seen a slight decrease in work outsourced to India and other outsourcing hubs. Last year, AT&T established a mobile applications development centre in Texas and Kronos, the workforce management solutions company, recently established a development centre in Indiana. PayPal, Dow and Garmin have also established research and development centres in the United States in the last few years.

Companies often receive tax deductions in exchange for doing business in the United States. One of the biggest breaks comes from the domestic production deduction in section 199 of the US Tax Code. Any taxpayer can deduct expenses related to the production of an item in the United States. This includes the manufacture of computer software and tangible property, according to the Internal Revenue Service. To qualify, a business must produce the item in the United States.

4 Are there in your jurisdiction any fiscal or customs incentives, development grants or other government incentives to promote outsourcing operations within your jurisdiction?

While President Obama has proposed a number of federal incentives for companies to keep work in the United States, at the moment most incentives promoting outsourcing operations in the United States are made available at the state and municipality level, typically in the form of tax incentives as described above.

Legislation and regulation

5 Is outsourcing as a commercial or operational concept specifically recognised and provided for in your legal system? How?

Outsourcing is not specifically provided for within the US legal system. It operates under the traditional rubric of basic contract law.

6 Is there any legislation or regulation that directly prohibits, restricts or otherwise governs outsourcing, whether in (onshore) or outside (offshore) your jurisdiction?

There are a number of laws, regulations and executive orders that prohibit the federal government from outsourcing functions that are inherently governmental in nature (see 41 USCA section 3101).

In addition, there have been a number of attempts to restrict outsourcing overseas, a practice commonly known as ‘offshoring’. For example, in 2004, Congress enacted the Thomas-Voinovich Amendment to the 2004 Omnibus Spending Bill, which prohibited certain federal agencies from using ‘contractor[s] outside the United States’, unless the work was previously performed overseas or it was necessary in the interests of national security (Consolidated Appropriations Act of 2004, section 647(e), Pub L No. 108-199, 118 Stat 3, 362 (2004)). However, because the Thomas-Voinovich Amendment applied only to that year’s annual budget, it expired in 2005. There was an attempt to render the prohibition permanent, in the Dodd Amendment to the Jumpstart Our Business Strength (JOBS) Act, but the Dodd Amendment was ultimately stricken from the JOBS Act (JOBS Act, S 1637, 108th Cong (2004); HR 4520, 108th Cong (2004)).

There are a number of state anti-offshoring laws, as well. At least one of these laws prohibits outright any work performed under state government contracts from being performed overseas (NJ Stat Ann 52:34-13.2 (2009)), while others require that preference be given to domestic contractors or that contractors disclose where the work will be performed during the bid process (see, eg, NC Gen Stat 143-59 1A (2008), Ind Code 4-13.6-6-2.7 (2005)).

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7 What are the consequences for breach of the laws directly restricting outsourcing?

Generally, the laws discussed above that directly restrict outsourcing are prohibitions on government contacting that result in the prohibition being included in the contract terms (see, for example, NJ Stat Ann 52:34-13.2 (2009)). (Each contract shall 'include provisions specifying that all services performed under the contract or performed under any subcontract awarded under the contract must be performed within the United States'). Thus, a party in breach of those clauses could face breach of contract penalties.

8 Describe any sector-specific legislation or regulation that applies to outsourcing operations.

The American Bar Association recognises legal process outsourcing and has provided that the outsourced work must be done in accordance with the ethical rules of practice including protecting confidential information and the prohibition against the unauthorised practice of law.

Generally, vendors must comply with the laws and regulations applicable to the client. For example, vendors in the health-care sector must comply with HIPAA and other data privacy protection laws and vendors to financial institutions have to comply with the Dodd-Frank Act.

9 How does competition regulation apply to outsourcing contracts or structures?

Antitrust law in the United States favours open markets and competition. In outsourcing engagements, antitrust principles are relevant to joint ventures and to long-term services contracts that restrict the ability of a customer to obtain competitive services from another provider. Exclusivity provisions in outsourcing contracts should be reviewed for compliance with federal and state antitrust principles.

10 Are there any draft laws or legislative initiatives specific to outsourcing that are being developed or are contemplated?

Outsourcing, and in particular offshoring, was a particularly hot topic in 2004 and 2005. By 2007, over 330 anti-offshoring bills had been introduced at the state and federal levels, which would restrict offshoring in varying degrees. 'Nat'l Found for Am Policy, Anti-Outsourcing Efforts Down But Not Out' (2007), at www.nfap.com/pdf/0407OutsourcingBrief.pdf. Although this level of activity does not exist today, new legislation does get introduced from time to time.

Contractual considerations

11 What are the typical corporate or quasi-corporate structures or vehicles used to create outsourcing arrangements?

In the United States, most outsourcing deals are accomplished without using a separate corporate or quasi-corporate structure or creating a separate legal entity. Instead, outsourcing deals typically utilise a services contract entered into directly between the customer and the provider wherein the provider uses its own infrastructure and personnel to perform the services, though frequently certain resources (eg, personnel, equipment, software) may initially be transferred or made available from the customer to the provider via rebadging, assignment, sublicensing or the like.

A lesser used outsourcing structure is where a company will create a 'captive' subsidiary and then contract with that subsidiary for outsourced services. This type of structure is sometimes used by companies that want to more closely manage the outsourced operations, mitigate risk or set up a separate profit and loss centre for greater control or visibility. This is sometimes an attractive option for companies that plan to outsource significant operations to an offshore company.

Another legal structure that is occasionally used is the build-operate-transfer (BOT) structure. In a BOT arrangement, the provider will establish and operate the outsourced services for the customer on a dedicated basis for a specified period of time, after which the customer will have the option to absorb the outsourced operation into its own business for a pre-agreed price. This structure is sometimes used in public-private partnerships for public works projects such as the construction and operation of toll roads or airport terminals.

12 What forms of outsourcing contract are usually adopted in your jurisdiction?

Outsourcing agreements in the United States can take many forms. The simplest example is a straightforward services agreement between a provider and customer with operations only in the United States, which specifies the particular services to be performed.

For more complex outsourcing arrangements involving services across multiple affiliates in various countries, the parties will frequently opt to structure their relationship through a global master framework agreement between the two primary contracting entities, with local enabling agreements to be entered into among the various local affiliates as needed to conform to local law and address specific local business needs or requirements. Such framework agreements typically include umbrella provisions that are intended to govern the parties' global relationship and that generally are not expected to vary from jurisdiction to jurisdiction, such as governance, IP rights, confidentiality, liability limitations, indemnities, service-level agreements and other performance and quality assurance requirements, transition and transformation, general economic terms (including foreign exchange risk), term and termination, resource management (including equipment, software and personnel), and any customary (eg, 'boilerplate') provisions. Provisions related specifically to the jurisdictions or affiliates in question are generally left to the local parties to address through local enabling agreements, such as pricing (subject to any overarching framework agreement terms), scope of services and any requirements necessary to address or comply with local law, including labour and data privacy laws. A key benefit of this structure is that it allows the parties to manage the relationship globally, while providing the local parties with the flexibility necessary to make it work for their particular needs.

For outsourcing arrangements involving project work or other types of ad hoc services, or where the parties contemplate the future addition of other types of services, the agreement can be structured so that such services can be covered through the execution of future work orders, statements of work or service schedules. This type of arrangement can be combined with the master framework structure described immediately above to create a highly flexible arrangement that will enable the parties' relationship to evolve as business needs change.

13 Outline the contractual approaches that are adopted in your jurisdiction to address regulations affecting outsourcing.

Outsourcing agreements in the United States generally have one or more sections dedicated to compliance with laws or an attached exhibit with regulatory flow-downs. For certain outsourcing arrangements, these provisions will be heavily negotiated to allocate risks between the parties accordingly. The compliance with laws provisions are particularly important in the context of highly regulated industries such as the financial, energy and health-care sectors. For instance, in deals involving handling or accessing sensitive personal information or protected data (eg, personally identifiable information, health records and consumer financial information), the provider is generally required to comply with all rules and regulations that are applicable to the customer's access to and use of such data,

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including laws such as the Health Insurance Portability and Accountability Act of 1996 and its implementing regulations (HIPAA) and the Gramm-Leach-Bliley Act (GLBA).

The agreement should also address how changes in laws will be handled, including identifying the parties' respective obligations with regard to monitoring and complying with such changes in laws, as well as how costs will be allocated among the parties with regard to any changes in laws that affect the cost of performing or utilising the services.

The agreement will typically also address the parties' obligations regarding audits and investigations by regulatory authorities and agencies that oversee the customer's business.

Data protection

14 Identify the principal data protection legislation applicable to outsourcing operations.

In the United States, data protection obligations primarily spring from a patchwork of industry-specific statutes at the federal and state levels, although certain laws can apply on a more general basis. Most prominently at the federal level, access to, processing of or otherwise maintaining financial information will give rise to data security obligations under the the Federal Deposit Insurance Act and the Fair Credit Reporting Act. Similarly, access to, processing of or otherwise maintaining non-public medical patient information are subject to comparable security obligations under HIPAA. HIPAA and GLBA, as well as numerous state laws, include notification obligations for individuals whose protected information is accessed, acquired, used, or disclosed without authorisation, whether stored by the primary entity or its outsourced service provider. In addition to the foregoing, California and Massachusetts now further require the implementation and maintenance of reasonable security measures for such information on their respective residents. More generally, the Economic Espionage Act of 1996 (and reciprocal US state trade secret laws) and section 5 of the Federal Trade Commission Act (and reciprocal US state trade practice laws) apply, respectively, to all outsourcing arrangements involving access to the above-described data in the nature of trade secrets and personally identifiable information.

15 How do rules on the ownership, location, processing and distribution of data apply to outsourcing in your jurisdiction?

The United States does not have statutorily defined restrictions broadly affecting data storage, ownership or transfer that are similar to other countries or regions such as the European Union. Trade secret and copyright protection could be claimed for particular kinds of proprietary data. But more broadly, there are fewer defined obligations. Nevertheless, US national security restrictions, import and export regulations and cases litigated by the US Federal Trade Commission under section 5 of the Federal Trade Commission Act and other implementing rules (and related guidance) for both GLBA and HIPAA have helped establish a generally recognised minimum legal standard for information security measures required for certain sensitive information in the United States. It is now increasingly acknowledged that companies should implement customised, comprehensive information security programmes reasonably designed to protect the security, confidentiality and integrity of the types of information mentioned in question 14. Contracts with US state or federal agencies or offices increasingly include additional specific data handling requirements and may even impose territorial restrictions on data distribution. Moreover, companies that store, process, or transmit credit cardholder data must also adhere to the Payment Card Industry Data Security Standards, which are similar in a number of respects to the standards mentioned above.

Finally, as a general matter, data stored in centres located in the Unites States cannot be accessed by governmental authorities or otherwise used (as mandated predominantly by the Privacy Act of 1974) unless permitted by the Fourth Amendment of the US Constitution. Nevertheless, citing section 215 of the USA Patriot Act, US intelligence and law enforcement agencies have increasingly sought to obtain data stored on the cloud servers of companies owned by or affiliated with US-based providers or records holders.

Labour and employment

16 What is the relevant labour and employment legislation for outsourcing transactions?

In the United States, employment laws exist at the federal, state and local level and apply generally to personnel involved in outsourcing transactions, just as in any other employment context. There are no US employment laws specifically directed to personnel involved in outsourcing transactions.

There are myriad employment laws in the United States that must be considered in an outsourcing context, whether personnel are being hired, terminated, relocated, rebadged or moved to a different position. Generally, US employers may hire and fire employees 'at will' and employees may also resign at will, unless an employment contract or a union collective bargaining agreement provides otherwise.

Some laws that should be considered in the outsourcing context are:

- employment eligibility – an employment eligibility form (I-9) is a federal form that must be completed for every new employee hired in the United States and each employee must document his or her identity and confirm that he or she is legally entitled to work;
- pre-employment checks – various federal and state laws affect the ability of an employer to conduct background, credit, health condition, criminal and drug and alcohol checks on an applicant for employment and prescribe who may conduct them and how such information may be used in the hiring context. These include the Fair Credit Reporting Act, the American with Disabilities Act (ADA) and a variety of state laws and guidance from administrative agencies;
- wages – the Fair Labor Standards Act (FLSA) creates minimum wage and overtime pay standards (and exemptions to them). States and localities may have additional and higher wage requirements;
- benefits and welfare – the Employee Retirement Income Security Act (ERISA) applies to employee benefits and welfare plans. In addition, the Family and Medical Leave Act (FMLA) provides a right to eligible employees to extended leave from the workplace in connection with child-rearing activities and family care. Similarly, the ADA requires that workers with a physical or mental disability (as defined in the law) be provided reasonable accommodations to overcome their disabilities so that they perform their jobs or apply for a job the employer has available;
- safety – the Occupational Safety and Health Act (OSHA) establishes certain standards for workplace safety and health, including some that are industry-specific;
- lay-offs – the federal Worker Adjustment and Retraining Notification Act (WARN Act) typically requires prior notice to affected employees and others where a large employer carries out a mass lay-off or a plant-closing (as defined in the law). Some states have their own versions of this law. Termination of a large number of employees as a result of an outsourcing may trigger this law, even if some or all of the individuals will be offered new jobs by the service provider;

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- discrimination and harassment – a variety of federal and state laws protect against employment discrimination and harassment based on specified attributes of a worker, including race, gender, age, national origin, pregnancy and sexual orientation, among others. These include Title VII of the Civil Rights Act, the ADA, the Age Discrimination in Employment Act (ADEA), the Equal Pay Act and the Fair Pay Act. These laws need to be considered carefully when selecting who is terminated, transferred or offered a new or different job position as a result of an outsourcing; and
- US government contractors – the Service Contract Act (SCA) applies to every contract with a principal purpose of providing services to the US government. The SCA requires minimum wage rates and certain health and retirement benefits depending on the type of work. If there is a collective bargaining agreement, a successor employer must pay employees covered by the SCA no less than amounts the employees would have received under the predecessor's collective bargaining agreement for the first year of employment.

As a result of the enactment of the federal Patient Protection and Affordable Care Act, material changes that affect US employers may factor into a company's consideration of whether to outsource jobs or bring back previously outsourced jobs. Among those are the requirements that employers with 50 or more full-time employees provide minimum essential health-care coverage for at least 95 per cent of their workforce and that such coverage be 'affordable' based on the employee's wages. Future requirements will include the inability to offer different levels of fully insured coverage to management and executive personnel and an excise tax on employers that provide health-care benefits that are too rich – referred to as the 'Cadillac' tax.

While not specifically employment laws, state legislation and common law regarding the validity and enforceability of restrictive covenants in the employment context, such as non-compete agreements, should be considered when determining what employment terms may apply to personnel engaged to work on an outsourcing or the termination of personnel subject to such covenants. In addition, when hiring contractors in support of an outsourcing, a company will need to consider the US jurisprudence that deals with the distinctions between an independent contractor and an employee. These distinctions vary depending on state law, and usually focus on factors such as who directs the activities of the individual, provides the means and tools for the job and bears the risk of the work. An improper determination may trigger the applicability of many of the employment laws referenced above in respect of the contractor worker.

17 In the context of an outsourcing, how does labour and employment law apply to a change in initial or subsequent service providers, or transfers of undertakings or parts of undertakings?

If a change or transfer involves employees being hired, terminated or transferred, it will implicate one or more of the general employment laws of the type referenced in question 16. If the change will result in mass lay-offs or plant closings, the WARN Act will be implicated. If the change will result in service provider personnel being employed by the customer or the new provider, or customer personnel being employed by the new provider, general laws relating to their employment eligibility, wages, benefits, entitlements, etc, will apply. If the employees that are outsourced are represented by a union, successorship laws may apply to restrict the ability to change the terms and conditions of employment of the outsourced jobs, particularly where there is no physical change in the location of the jobs.

18 Are there any requirements to consult or negotiate with organised labour, works councils or employees regarding an outsourcing?

Generally, no. If the affected employees are represented by a union, the employer may have to bargain about the decision and effects of such outsourcing. In addition, to the extent that affected employees are covered by a union collective bargaining agreement, the agreement may have a requirement for such consultation or other requirements regarding how employees will be treated as part of the outsourcing process.

19 Are there any notification or approval requirements that apply to an outsourcing transaction?

There are no such requirements in the United States applicable specifically to outsourcing transactions. As noted earlier, to the extent that an outsourcing will result in a mass layoff or a plant closing (as defined at the federal or state level), notifications to employees and certain local agencies and officials may be required under the WARN Act and state equivalents. The law covers employers of 100 or more employees (with certain exclusions for recent or partial time employees). Typically, 60 calendar days prior notice is required before the closure or layoff. The notice must contain certain minimum information provided by law.

Rules to determine applicability of the WARN Act and state equivalents are complex and contain a variety of exemptions and special circumstances. Generally, there is a plant closing when a facility or operating unit closes for more than six months, or when 50 or more employees lose their jobs during any 30-day period at a single site of employment. A mass lay-off occurs when 50 to 499 employees are terminated during any 30-day period at a single employment site (or for certain multiple related lay-offs, during a 90-day period) if these employees represent at least 33 per cent of the employer's workforce where the lay-off will occur and the lay-off results in an employment loss for more than six months (for 500 or more employees, the 33 per cent rule does not apply).

20 What are the legal implications, including penalties, for non-compliance with the labour and employment rules and procedures?

The legal implications vary depending on which laws have been violated. In general, the penalties are limited to money damages and do not require that employees reverse the outsourcing transaction. For example, violations of wage and hours laws can result in retroactive pay plus liquidated damages for an employee. Violations of the WARN Act can result in administrative and court actions, fines, back-pay and obligations to pay attorneys' fees. Violations of anti-discrimination laws can result in awards of monetary damages, back-pay and reinstatement of an employee to their job. For employees represented by a union, the failure to bargain over the decision to, and effects of, outsourcing could result in 'make-whole' remedies, including back-pay and lost welfare benefits.

21 What are the key immigration and visa requirements for employees of customers or providers entering your jurisdiction to manage outsourced operations or to receive or provide training?

Foreign nationals entering the United States for the purpose of working need to have a work visa, green card or other work authorisation and, depending on the type of work authorisation, a job or job offer or a sponsoring organisation. The Immigration and Nationality Act provides for temporary work visas, seasonal work visas and exchange worker visas, among others. In addition, permanent resident status (green cards) may be applied for by individuals with permanent employment in the United States, but given the time and complexities of that process, most work permit requests usually start with an application for temporary worker status.

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Update and trends

Rise of cloud computing

The rise of cloud computing as a services model continues to affect the outsourcing industry. Many outsourced solutions now include aspects of cloud-based services while some companies exclusively provide cloud-based offerings, essentially shifting from a service provider to a product provider.

The productising of service offerings will undoubtedly continue shifting the economics and the way outsourced offerings are structured, negotiated and documented. In general, the cloud-based offerings lower transaction costs because they are standardised offerings. Due diligence and effective contracting remain important, however, to ensure a customer has the right solution for its needs (eg, the cloud solution has adequate business continuity redundancy where there is an interruption in services).

Related to the rise of the cloud is an increased focus on intellectual property since many service providers can reuse their solutions or come to the engagement with existing solutions. Therefore, allocating intellectual property rights between the parties remains a central issue in many negotiations.

More sophisticated services subject to outsourcing

Due in part to the reduction of savings using a pure labour arbitrage model due to the rising costs of services overseas and the growing sophistication of service providers, more sophisticated services are becoming the subject of outsourcing and service providers continue to grow more sophisticated in the method of their offerings.

For example, companies in the health-care sector are facing increased pressures to find efficiencies. Many service providers are well-suited to help. With the move into health-care, however, service providers are facing new industry regulations affecting their services since health-care is a highly-regulated sector of the economy. As a result, service providers are investing more heavily in compliance and the parties must focus on compliance with laws and obligations in the service agreements to ensure the obligations are correctly aggregated.

Privacy

The heightened focus on privacy has affected outsourcing. Particularly with cloud-based models, customers are focused on how and where data is being acquired, transferred and stored. Negotiations focus on answering those questions and documenting the agreed solution to ensure both customer and service provider are aligned when it comes to managing data.

For temporary worker status, typically the employer must file a petition with the US Citizenship and Immigration Services (CIS) agency. Once that is approved, the worker applies for the visa. The worker must also meet other requirements under immigration laws before a visa may be granted.

There are many types of temporary work visas depending on the type of work the individual will be performing. The more popular visa categories applicable to the hiring or intra-company transfers of information technology or outsourcing professionals are the H1B and L1 visas. These visas require continued employment by the employer during the employee's stay in the United States and certain educational and experience requirements must be met. Some quotas apply to temporary worker visas and the preferred visa may not be available at the time it is requested. Different visa requirements may apply to workers from countries with certain trade agreements with the United States. J-1 visas are for participation in work exchange programmes and not for permanent employment. For those, the individual needs to have a sponsoring organisation in the United States. For foreign nationals entering the United States only for short term temporary training, a visitor visa (B1 or B2) may be available.

Taxation

22 Outline the taxation rules that apply to the establishment and operation of outsourcing captives or similar establishments in your jurisdiction.

The US federal income tax treatment of foreign corporations operating in the United States depends initially on whether the foreign corporation is operating in the United States through one or more US subsidiary companies or through a branch or other office. In the former case, the US subsidiaries will be separate taxable entities for federal tax purposes, will generally file their own federal income tax returns and will pay US tax.

In the latter case, the federal tax treatment of such a branch or office will depend upon whether the foreign corporation is resident in a country with which the United States has an income tax treaty. Where the foreign corporation is a qualified resident of a treaty country, then the foreign corporation will be subject to US tax only on business profits attributable to a US permanent establishment (PE). An office or fixed place of business will generally constitute a PE and in such a case the foreign corporation must file a federal income tax return and pay US corporate taxes on the income of the foreign corporation properly allocable to the PE. There are exceptions for offices that merely gather information, purchase goods or supply products to customers. However, where the foreign corporation is not a resident of a treaty country, then a different test applies. In such a case the foreign corporation is subject to federal income tax on income that is effectively connected with a US trade or business. The US trade or business standard is a much lower standard that the PE standard, so while certain activities conducted in the United States by a resident of a treaty country might not be subject to US tax, the same activities of a foreign corporation not a resident of a treaty country would be subject to US tax.

In addition, US subsidiaries or PEs will be subject to US transfer pricing rules under section 482 of the Internal Revenue Code in respect of any cross-border transactions, including loans, services, technology transfers, etc, with the foreign parent company or any other foreign affiliates. US subsidiaries and PEs are required to file an information return with their federal income tax returns reporting any such inbound or outbound transactions. The federal income tax authorities (IRS) will carefully review any transactions in which the US subsidiaries or PEs are making tax deductible payments to a foreign-related party to ensure compliance with the US transfer pricing rules. In order to avoid potentially significant penalties should the IRS determine that the transfer pricing is overstated, and thus US tax has been avoided, contemporaneous documentation of all transfer pricing methodologies should be prepared before the filing of a federal income tax return.

Many of the states impose their own separate corporate income taxes, franchise taxes or other forms of taxes on gross receipts. The states are not bound by the provisions of a US income tax treaty and have their own differing sets of rules as to whether a foreign corporation is considered to be doing business in a particular state and thus subject to state income tax, sales and use taxes, etc. It is common for a foreign corporation to not have a PE for federal income tax purposes because of the provisions of an applicable income tax treaty, but at the same time be considered to be doing business in one or more states for state tax purposes.

23 Outline the indirect taxes in your jurisdiction that apply to the import of offshore outsourcing services by companies within your jurisdiction.

The US federal government does not impose a sales tax or value added tax. Many of the states impose sales taxes on the sale of tangible personal property to residents of their state. State sales taxes generally do not apply to services, whether provided by a US subsidiary or a PE.

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In order for a foreign corporation to be required to collect sales tax on sales to residents in a particular state, that foreign corporation must have a high enough level of contacts with such state. In many cases, out-of-state retailers take the position that they have insufficient contacts and thus are not subject to sales tax.

Current issues

24 Identify and give details of any notable cases or administrative or regulatory determinations within the past three years in your jurisdiction that have directly involved outsourcing.

There have not been any recent notable cases that directly affect outsourcing relationships in the United States. However, there have been and continue to be cases dealing with related issues, such as labour law disputes arising from elimination of outsourced jobs and administrative decisions examining whether state agencies or public utilities adhered to state laws or regulations restricting or otherwise regulating outsourcing and other contracts. For more information on labour laws or the types of state laws that may be implicated in those cases, see the related portions of this chapter.

25 What are the main challenges facing outsourcing within, from or to your jurisdiction?

As a general matter, offshore outsourcing has never been actively encouraged in the United States and has occasionally been met with adverse political pressures. Such adverse political pressures often seek to tax the use of offshore outsourcing or impede aspects of the offshoring model (eg, immigration and visa restrictions), though robust anti-outsourcing legislation has never been passed into law. To date, the issue of offshore outsourcing has tended to be more an item for campaigns than for governing.

In comparison, onshore outsourcing faces much fewer adverse domestic political pressures. There can be adverse effects from the practice due to the displacement of current employees, but many companies employ outside providers to supply goods or services to their organisation so adding to that roster in the name of increased efficiency or decreased cost is generally accepted. Indeed, some transferred employees see a benefit in such an arrangement due to increased career mobility and training opportunities. From the company side, the pressures to build skills and efficiencies while reducing costs continue to rise. As a result, the pressure to use outsourcing as a tool to achieve some or all of those ends will likely continue.

One current political issue that would affect offshore outsourcing is immigration reform. A comprehensive immigration bill passed the US Senate on 27 June 2013. The legislation still needs to pass the US House and be signed by the President to become law. That both would occur with the law in its current form is highly unlikely. The Senate-passed bill increases the total number of certain visas (H1B visas and L1 visas) while placing restrictions on their use. These restrictions would make it more difficult for outsourcing providers with high numbers of workers under these visa programmes to enter and stay in the United States.

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